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## Pennsylvania v. Union Gas: Congressional Abrogation of State Sovereign Immunity Under the Commerce Clause, or, Living with Hans

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# PENNSYLVANIA V. UNION GAS: CONGRESSIONAL ABROGATION OF STATE SOVEREIGN IMMUNITY UNDER THE COMMERCE CLAUSE, OR, LIVING WITH *HANS*

## INTRODUCTION

The eleventh amendment<sup>1</sup> constricted the state-citizen diversity clause of article III<sup>2</sup> by providing that citizens of one state could not sue another state in federal court. Its words appear innocent when compared with the amount of academic<sup>3</sup> and judicial<sup>4</sup> controversy they have generated. A purely textual analysis would hardly reveal the areas into which the amendment has intruded.<sup>5</sup>

The Supreme Court's consistently expansive reading of the amendment has been justified by a concern for state sovereign immunity, an ostensibly constitutional principle for which the amendment stands.<sup>6</sup> In

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1. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

2. "The judicial power shall extend to all Cases . . . between a State and Citizens of another State . . ." U.S. Const. art. III, § 2, cl. 1.

3. See, e.g., J. Orth, *The Judicial Power of the United States—The Eleventh Amendment in American History* (1987); C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. Penn. L. Rev. 1203 (1978) [hereinafter *Field II*]; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Penn. L. Rev. 515 (1977) [hereinafter *Field I*]; Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988); L. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342 (1989); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61 (1984); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682 (1976). But see W. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 Harv. L. Rev. 1372 (1989).

4. A majority of the Court currently adheres to a constitutional principle of state sovereign immunity. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 235-47 (1985). Justice Brennan, however, strongly disagrees. He set forth his lengthy argument for the diversity theory in the same case. See *id.* at 247-302 (Brennan, J., dissenting).

5. For example, the Court has interpreted the amendment to restrict the federal judicial power in admiralty suits, despite the amendment's express terms ("any suit in law or equity"). See *Ex parte New York*, No. 1, 256 U.S. 490, 497 (1921) (overruling *United States v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647)). See generally Fletcher, *supra* note 3, at 1079-83 (arguing that in omitting admiralty from text of eleventh amendment, adopters probably at least foresaw application of federal law in private admiralty suits against states).

6. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (referring to "the fundamental principle of sovereign immunity"); *New York*, 256 U.S. at 497 (idea that private plaintiff cannot sue a state without its consent is "the fundamental rule of which the Amendment is but an exemplification"). But see J. Orth, *supra* note 3,

the most expansive application of the eleventh amendment, the Court embraced a constitutional principle of state sovereign immunity and held that the amendment precluded private plaintiffs from suing states in federal question cases.<sup>7</sup>

When the Supreme Court granted certiorari in *Pennsylvania v. Union Gas*,<sup>8</sup> commentators thought that the Court would use the case to put its eleventh amendment jurisprudence in order.<sup>9</sup> The decision was supposed to address the issues of whether Congress had abrogated the states' immunity with the requisite clear language in the text of the statutes in question and whether Congress had the power to do so under the commerce clause.<sup>10</sup>

Despite expectations, the *Union Gas* Court addressed the main issue (whether Congress has power under the commerce clause to abrogate the states' sovereign immunity) without definitively answering it<sup>11</sup> and injected uncertainty into the supposedly settled requirement of a clear statement of abrogation by Congress.<sup>12</sup>

Part I of this Comment reviews the adoption of and theories about the eleventh amendment, as well as its common law history. Part II sets forth the lower court opinions and summarizes how the Supreme Court voted. Part III discusses and analyzes the opinions of the Court in an attempt to understand the impact of *Union Gas*. This Comment concludes that because of the composition of the two majorities, *Union Gas*

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at 12-29 (discussing British and early colonial understanding of sovereign immunity and understanding expressed at ratifying conventions); Gibbons, *supra* note 3, at 1895-914 (same).

7. See *Hans v. Louisiana*, 134 U.S. 1 (1890); *infra* notes 17, 25-32 and accompanying text.

8. 108 S. Ct. 1219 (1988).

9. See, e.g., Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. Chi. L. Rev. 61, 147-50 (1989) (discussing possible outcomes of *Union Gas*); Shreve, *Letting Go of the Eleventh Amendment*, 64 Ind. L.J. 601, 601-02, 615 (1989) (suggesting that the *Union Gas* Court look for provisions other than the eleventh amendment on which to base state immunity).

10. The two issues are almost invariably addressed in this logically backward order. This method has the advantage of avoiding constitutional interpretation unless it is absolutely necessary (that is, unless Congress has made a sufficiently clear statement of its intent to abrogate). But see *In re McVey Trucking*, 812 F.2d 311, 314-27 (7th Cir.), *cert. denied*, 484 U.S. 895 (1987) (addressing issue of source of power to abrogate before issue of clear statement).

The Court had left open the commerce clause issue in two recent cases. See *Welch v. Texas Dep't of Highways & Transp.*, 483 U.S. 468, 475 (1987); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 250-53 (1985).

11. Compare *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2281-86 (1989) (opinion of Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J.) with *id.* at 2295 (opinion of White, J., concurring in judgment with respect to the article I issue).

12. See *id.* at 2277-80 (opinion of Brennan, J., joined by Marshall, J., Blackmun, J., Stevens, J., and Scalia, J.); *id.* at 2295-96 (Scalia, J., concurring with respect to statutory interpretation issue). But see *Dellmuth v. Muth*, 109 S. Ct. 2397, 2400-02 (1989) (handed down same day as *Union Gas*, reaffirming clear statement rule for congressional abrogation).

lends itself to widely divergent interpretations and may further confuse eleventh amendment jurisprudence.

## I. BACKGROUND

### A. *History and Theory*

Born in the financial aftermath of the Revolutionary War,<sup>13</sup> the eleventh amendment was a direct response to the Supreme Court's decision in *Chisholm v. Georgia*.<sup>14</sup> In *Chisholm*, the Court upheld the attempt of an estate executor from South Carolina acting on behalf of the decedent, a South Carolina citizen, to recover in assumpsit money owed by the state of Georgia for military goods.<sup>15</sup> The eleventh amendment was passed approximately three years after the final judgment in *Chisholm*.<sup>16</sup>

Despite its plain language, the amendment has engendered two radically different schools of thought regarding its meaning and effect. First, the sovereign immunity or "profound shock"<sup>17</sup> theory posits that article

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13. In the 1783 peace treaty, Great Britain and the newly-formed United States agreed that both American and British creditors would be able to recover the full value of all current debts in sterling. See Gibbons, *supra* note 3, at 1900. Judge Gibbons argues that concerns about enforcing the treaty were prevalent, especially with regard to the southern states who owed approximately \$28 million to the British. Those states were incensed because the British army had taken thousands of slaves when it evacuated after the Revolutionary War, in violation of the treaty. In response, the southern states enacted barriers to collecting debts and refused to enforce other treaty provisions. Concerns with noncompliance thus informed much of the debate surrounding the ratification of article III. See *id.* at 1899-901.

14. 2 U.S. (2 Dall.) 419 (1793). Each Justice, as was the early custom, delivered an opinion. Justice Iredell wrote the only dissent. See *id.* at 429.

15. See *id.* at 466 (opinion of Wilson, J.). Judge Gibbons noted, as background for *Chisholm*, that "the American government was relying on the availability of relief in the federal courts for treaty violations as a bargaining position with the British government." Gibbons, *supra* note 3, at 1920. Thus, the framers probably envisioned a somewhat generous reading of Article III. Cf. The Federalist No. 80 (A. Hamilton) (discussing need for alienage jurisdiction to further foreign relations).

16. See J. Orth, *supra* note 3, at 19-20; C. Jacobs, *supra* note 3, at 65-67.

17. The phrase originated in the *Hans* Court's discussion of the adoption of the eleventh amendment, in which the Court stated that the decision in *Chisholm* sent a "shock of surprise throughout the country." *Hans v. Louisiana*, 134 U.S. 1, 11 (1889). The evidence relied on by advocates of the profound shock theory is basically two-fold. First, the states adopted the amendment so quickly. This is cited as demonstrative of the intense negative reaction to *Chisholm*. Professor Orth, however, notes that "[s]peedy adoption is not significant . . . ; State legislatures were less busy in the early days of the Republic and few items on their agenda were more important than state debts." J. Orth, *supra* note 3, at 27.

Second, seemingly dispositive are statements by James Madison, John Marshall and Alexander Hamilton on the state-citizen clause of article III. At the Virginia ratifying convention, Madison stated

"Its jurisdiction [the federal jurisdiction] in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the federal court."

*Hans*, 134 U.S. at 14 (quoting 3 The Debates in the Several State Conventions on the

III was never intended to allow for a private suit against a state. The amendment was the natural reaction to the *Chisholm* Court's attempt to read article III in this way. Under the sovereign immunity theory, the amendment bars all private suits against a state in federal court, regardless of jurisdictional basis or citizenship of the private plaintiff. The underlying meaning of article III's grant of congressional power informs the amendment's explicit limitation on the federal judicial power.

A second school of thought interprets the amendment narrowly, arguing that it restricts federal judicial power only where diversity is the sole jurisdictional basis for a suit against a state.<sup>18</sup> Thus, any federal question

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Adoption of the Federal Constitution 533 (J. Elliot ed. 1836)). At the same convention, Marshall stated

With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States.

*Id.* at 14 (quoting *The Debates*, *supra*, at 555-56).

Finally, in *The Federalist* No. 81, Hamilton wrote

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal."

*Id.* at 13 (emphasis in original) (quoting *The Federalist* No. 81 (A. Hamilton) (1st ed. 1788)). The *Hans* Court cited these statements as indicative of a pre-*Chisholm* understanding that article III did not by itself do away with state sovereign immunity and that the state-citizen diversity clause could not operate to allow a private suit against an unwilling state in federal court. The Court also relied on the statements by Madison, Marshall and Hamilton for the proposition that state sovereign immunity was embodied in the Constitution. *See id.* at 12-14.

Commentators have recently clarified the meaning of these statements. Professor Field argues that these statements were made simply to placate anti-federalist opponents of ratification who believed that article III itself abrogated sovereign immunity. *See Field I*, *supra* note 3, at 527-36. Judge Gibbons claims that Madison's statement, made at the Virginia ratifying convention with an awareness of Virginia's peace treaty violations, meant that an unconsenting state could not be sued in federal court on a *state law* claim. *See Gibbons*, *supra* note 3, at 1905-06. In the alternative, it is possible that Madison was "merely dissembling." *Id.* at 1906. Marshall's statement was a "misreading" of article III that he later corrected in his opinions as Chief Justice. *Id.* at 1907 & n.85. Concerning the excerpt from *The Federalist* No. 81, Judge Gibbons explains that

Hamilton uses this passage to address fears that states could be compelled to repay [war] notes in gold and silver . . . .

. . . [T]he passage may be read as arguing not so much that the federal courts would not have jurisdiction over suits as that there would not be any right of action for plaintiffs to sue on.

*Id.* at 1911. Judge Gibbons also points to evidence from the New York and North Carolina ratifying conventions that the delegates did not understand sovereign immunity to be inherent in article III. *See id.* at 1912-13.

18. Typical reasons supporting the "diversity-only" theory include: the language of the amendment closely parallels the jurisdictional grant in article III, section 2; the language of the amendment does not mention federal question cases; Federalists and anti-

case, even one brought by a private in-state plaintiff, may be heard in federal court.<sup>19</sup> Simply stated, sovereign immunity survived the enactment of article III as a state common-law doctrine, allowing states to raise a defense of sovereign immunity in state law actions brought in federal court under the state-citizen diversity clause. In federally-created causes of action, however, article III's federal question grant of jurisdiction was intended to be coextensive with the legislative authority.<sup>20</sup> Thus Congress enacted the eleventh amendment to correct the *Chisholm* Court's overly broad interpretation of article III's state-citizen diversity clause.<sup>21</sup> Under this view, the amendment is only jurisdictional in nature, serving to bar private suits against unconsenting states for which the only jurisdictional basis is either the state-citizen or state-alien diversity clause. Decisions that expand the amendment based on an underlying constitutional principle of sovereign immunity are mistaken.<sup>22</sup>

Justice Brennan has enunciated a watered-down version of the diversity-only theory.<sup>23</sup> The "surrender" theory posits that in ratifying the Constitution, the states necessarily surrendered their right to be free from regulation by Congress pursuant to its *enumerated* powers. At the same time, the states consented to whatever means (including suit in federal

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Federalists supported the amendment; and the case overturned by the amendment was brought under the state-citizen jurisdictional grant of article III. See Jackson, *supra* note 3, at 44-48. In addition, at the time of the amendment, Congress had not yet conferred federal question jurisdiction; it did not do so until 1875. See, e.g., *Field I*, *supra* note 3, at 540 n.88.

19. A variation on the "diversity-only" theme contends that the language of the amendment limits judicial not congressional power and, therefore, Congress can abrogate states' immunity when legislating under its plenary powers. See Tribe, *supra* note 3, at 694. Professor Tribe, a proponent of this view, argues that precluding private suits against states can undermine Congress' article I legislative goals and that Congress, the branch closest to the people, will be most attentive to state concerns when considering abrogation. See *id.* at 694-95.

20. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 276-78 (1985) (Brennan, J., dissenting); Jackson, *supra* note 3, at 125. But see *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) ("the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III"; that is, article III is incapable of an interpretation which extends the federal judicial power to private suits against unconsenting states).

21. See *Atascadero*, 473 U.S. at 281-89 (Brennan, J., dissenting); see also Gibbons, *supra* note 3, at 2004 ("[T]he amendment . . . was the product of a clever maneuver by the Federalists to deflect republican opposition to *Chisholm*, while preserving the power of federal courts to hear claims arising under the 1783 peace treaty . . .").

22. See *Atascadero*, 473 U.S. at 259-60, 289 (Brennan, J., dissenting).

23. In *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), Justice Brennan distinguished the commerce clause, pursuant to which the states surrendered their immunity, from the contract clause, which is merely a self-imposed restriction on the states. See *id.* at 186-87, 190-91.

Professor Field has advanced a similar view. She would distinguish between different types of federal question cases by asking if the constitutional provision on which the federal question is based abrogates common-law immunity "of its own force." *Field II*, *supra* note 3, at 1268. Under her interpretation, *Hans* would survive because the ratification of the contract clause itself did not do away with sovereign immunity. See *id.* at 1266-67.

court) Congress chose to enforce such regulation.<sup>24</sup> The subtle substantive distinction between the diversity-only and surrender theories lies in their respective scopes. The latter views constitutional grants of enumerated powers as eliminating whatever sovereign immunity existed before ratification; the former does not distinguish between enumerated powers and other provisions.

## B. *A Difficult Precedent and its Progeny*

### 1. *Hans v. Louisiana*

Like its adoption, the first major interpretation of the eleventh amendment was also precipitated by economic realities, specifically, the southern states' repudiation of bonds they had issued to finance the Civil War.<sup>25</sup>

In 1879, Louisiana stopped levying taxes to pay the interest on its bonds and reduced the interest rate on those bonds.<sup>26</sup> In 1890, Hans, a Louisiana citizen, sued his state to recover on such bonds.<sup>27</sup> Hans argued that the issuance of the bonds created contracts between the state and the bondholders and that the state constitutional provision repudiating the bonds violated the contract clause by impairing those contracts.<sup>28</sup>

*Hans* is the Supreme Court's most forceful explication of sovereign immunity theory.<sup>29</sup> Bereft of textual support, the Court relied on the dissent of Justice Iredell in *Chisholm* and found that the amendment represented the "will of the ultimate sovereignty of the whole country."<sup>30</sup> The idea that a state could be subject to suit by an individual in federal court went against "the established order of things," and was "a construction [of the Constitution] never imagined or dreamed of," "a thing unknown to the law . . . so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted," and "anomalous and unheard of when the Constitution was adopted."<sup>31</sup> The *Hans* Court held that the eleventh amendment restricted the federal judi-

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24. See *Parden*, 377 U.S. at 191-92; see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457-58 (1976) (Brennan, J., concurring); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 300-01 (1973) (Brennan, J., dissenting).

25. The Supreme Court heard bond cases from 1875 until 1934. See *Gibbons*, *supra* note 3, at 1977-98, 2003. "[A]t the dawn of the post-Reconstruction era the Supreme Court faced a draconian choice between repudiation of some of its most inviolable constitutional doctrines [i.e., the contract clause] and the humiliation of seeing its political authority compromised as its judgments met the resistance of hostile state governments." *Id.* at 1974.

26. See J. Orth, *supra* note 3, at 66; *Gibbons*, *supra* note 3, at 2000.

27. *Hans v. Louisiana*, 134 U.S. 1 (1890).

28. See *id.* at 2-3.

29. See *supra* note 17 and accompanying text (discussion of sovereign immunity theory).

30. *Hans*, 134 U.S. at 11. This can be said, however, about every constitutional amendment.

31. *Hans v. Louisiana*, 134 U.S. 1, 14, 15, 16, 18 (1890).

cial power in all federal question cases.<sup>32</sup> In doing so, the Court broadly precluded the possibility of a citizen suing his own state in federal court.

## 2. Subverting *Hans*

In 1908, the Court partially repudiated *Hans* in form if not in substance. In *Ex parte Young*,<sup>33</sup> it held that the eleventh amendment did not protect a state officer who had acted pursuant to an unconstitutional statute.<sup>34</sup> That decision established the fiction that a state cannot authorize an unconstitutional act, and therefore, the offending state officer must necessarily have acted outside his authority.<sup>35</sup>

The repudiation of *Hans* began anew with the Warren Court. The issues of congressional abrogation of state immunity and state consent to suit came into focus as the key questions over which the theoretical battle would continue.

In *Parden v. Terminal Railway*,<sup>36</sup> an employee of a state-owned and operated railroad sued the state in federal court to recover for personal injuries under the Federal Employers' Liability Act ("FELA").<sup>37</sup> The state pleaded sovereign immunity.<sup>38</sup> The Court considered whether Congress intended to subject states to federal court suit when it enacted FELA and whether it had the power to do so.<sup>39</sup> The Court answered the

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32. *Id.* at 10-11.

33. 209 U.S. 123 (1908).

34. *Id.* at 159-60.

35. The Court explained:

[If the act to be enforced is unconstitutional], the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional.

*Id.* at 159. Professor Orth, among others, has noted the irony of this fiction. Liability under the fourteenth amendment normally requires state action, but in *Ex parte Young* the state officer was essentially stripped of his official status for eleventh amendment purposes and was still held liable for acting pursuant to an unconstitutional law. See J. Orth, *supra* note 3, at 130.

The Court later expanded the eleventh amendment's coverage even further, holding that the eleventh amendment bars suit by a foreign state against a state. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934). Chief Justice Hughes' opinion for the Court contains the following famous language: "Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control." *Id.* at 322. The Court thus grounded sovereign immunity not in the eleventh amendment but in the Constitution as a whole.

36. 377 U.S. 184 (1964).

37. *Id.* at 185-86. FELA provides that "[e]very common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," 45 U.S.C. § 51 (1982), and that such an employee can sue in federal court. *Id.* § 56.

38. See *Parden v. Terminal Ry.*, 377 U.S. 184, 186 (1964).

39. See *id.* at 187.



first question affirmatively, reasoning that Congress "meant what it said" when it made FELA applicable to "'every' common carrier."<sup>40</sup> The Court stated that "we should not presume to say, in the absence of express provision to the contrary, that [Congress] intended to exclude a particular group of . . . workers [i.e., those employed by state-owned railroads] from the benefits conferred by the Act."<sup>41</sup> One of those benefits was the right to sue in federal court.<sup>42</sup>

The Court also answered the congressional power question affirmatively and relied on the surrender theory.<sup>43</sup> When the states ratified the commerce clause, they necessarily surrendered their sovereignty in that area; Congress could thus subject the states to suit in federal court when it enacted FELA.<sup>44</sup> The Court further reasoned that the state, by operating a railroad in interstate commerce, had consented to being sued under FELA in federal court.<sup>45</sup> The Court relied on the fact that the state had notice of FELA when it began operating the railroad and that precluding private suits "would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct."<sup>46</sup>

Justice White, in dissent, argued that Congress could condition state participation in interstate commerce on amenability to suit in federal court only if that condition was unmistakably clear.<sup>47</sup> He maintained that the states' immunity from suit in federal court derives from the Constitution and therefore deserves greater protection.<sup>48</sup>

### 3. *Hans Redux*

Nine years later, the *Parden* dissenters advanced their position in *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*,<sup>49</sup> where state employees sought overtime pay and liquidated damages under the Fair Labor Standards Act ("FLSA").<sup>50</sup> The Court held that the states' constitutional immunity

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40. *Id.* at 187 (emphasis added).

41. *Id.* at 190.

42. The presumption used by the *Parden* Court is not embraced by the current Court. See *Dellmuth v. Muth*, 109 S. Ct. 2397, 2402 (1989) (although states are "logical defendants" under the Education of the Handicapped Act, lack of unequivocal textual evidence of congressional abrogation will defeat plaintiff's damages action).

43. See *Parden v. Terminal Ry.*, 377 U.S. 184, 190-92 (1964); *supra* notes 23-24 and accompanying text (discussion of surrender theory).

44. See *Parden*, 377 U.S. at 190-92.

45. See *id.* at 192.

46. *Id.* at 198.

47. See *id.* at 199.

48. See *id.*

49. 411 U.S. 279 (1973).

50. 29 U.S.C. § 216(b) (1982). Section 16(b) of the FLSA made any employer liable for wages, overtime compensation and liquidated damages, and subject to suit in "any . . . court of competent jurisdiction." *Id.* The definition of "employer" in section 3(d) at first expressly excluded the United States and the individual states, but was amended in 1966 to include employees of state hospitals and related institutions.

was not affected by the amended Act's extension of coverage because no clear evidence of congressional intent to lift state immunity existed.<sup>51</sup> Therefore, the Court did not reach the issue of whether Congress had the power to abrogate. The Court weakly distinguished *Parden*, reasoning that the operation of a railroad by Alabama was a proprietary activity<sup>52</sup> while Missouri's operation of a welfare department was governmental, a distinction that is now questionable.<sup>53</sup>

Justice Brennan dissented and found *Parden*'s surrender theory controlling.<sup>54</sup> He disputed the Court's theory that article III and the eleventh amendment embody a constitutional principle of state sovereign immunity.<sup>55</sup> Justice Brennan asserted that such immunity was merely an "ancient nonconstitutional" common-law doctrine.<sup>56</sup> He also elaborated on the surrender theory by distinguishing *Hans*, a case based on the contract clause, from *Employees*, which involved the commerce clause. There was no surrender of immunity in the contract clause because that clause is simply a "self-imposed prohibition[]" on the states; by contrast, the commerce clause is an enumerated congressional power "whose effective enforcement required surrender of immunity."<sup>57</sup>

In *Edelman v. Jordan*,<sup>58</sup> the Court qualified the *Ex parte Young* exception for private suits against state officers. It held that the eleventh

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51. See *Employees*, 411 U.S. at 285.

In Justice Marshall's often-quoted concurring opinion, he stated: "The root of the constitutional impediment to the exercise of the federal judicial power . . . is not the Eleventh Amendment but Art. III of our Constitution." *Id.* at 291 (Marshall, J., concurring). According to the historical evidence, Article III was intended to mean that the states cannot be subject to private suit without their consent. Thus, state consent to federal court suit is the true issue. See *id.* at 294-95. Justice Marshall reasoned that in *Parden* the state began operating the railroad well after FELA had been enacted. See *id.* at 296. Thus, Alabama had "at least legal notice" that operating an interstate railroad was conditioned on amenability to federal court suit. By contrast, Missouri had no "true choice" because it either had to consent to suit or cease running the relevant vital agencies. See *id.* Justice Marshall has since defected from the sovereign immunity camp. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting) (joined by Justice Marshall).

52. See *Employees*, 411 U.S. at 284.

53. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-47 (1985) (overruling category of "traditional governmental functions" as defining scope of state regulatory immunity).

54. See *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 298-99 (1973).

55. See *id.* at 309-10.

56. See *id.* at 314 (Brennan, J., dissenting).

57. See *id.* at 320 n.7 (Brennan, J., dissenting). This is, perhaps, a distinction without a difference. Both an express grant of power to Congress and a self-imposed restriction are irreversible absent a constitutional amendment. Furthermore, the textual basis for private enforcement in federal court of a self-imposed restriction, like the contract clause, is even more compelling. This is because the people placed such a restriction on the states; with an express grant of power, the people have just given Congress the right to impose restrictions on the states. Therefore, it may be incorrect to call such a restriction self-imposed in that it is not the states which are imposing the restrictions.

58. 415 U.S. 651 (1974).

amendment prohibits retrospective monetary relief absent state consent to federal court suit, even in an *Ex parte Young* action, because such relief would be paid out of the public fisc.<sup>59</sup> The award of prospective (injunctive) relief<sup>60</sup> was upheld.<sup>61</sup> The Court refused to find that the state consented to federal court suit merely by participating in a federal funding program. The Court noted that "we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction,' " thereby upping the abrogation ante.<sup>62</sup> Justice Brennan, in dissent, reiterated his surrender theory.<sup>63</sup>

In its 1976 decision in *Fitzpatrick v. Bitzer*,<sup>64</sup> the Court squarely addressed the congressional power issue and held that Congress can abrogate state sovereign immunity when it legislates pursuant to section five of the fourteenth amendment.<sup>65</sup> The Court reasoned that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by . . . § 5 of the Fourteenth Amendment."<sup>66</sup> It is difficult to tell whether the Court was tacitly distinguishing the fourteenth amendment from other congressional powers, such as those enumerated in article I.<sup>67</sup> Certainly Justice Brennan, concurring in the judgment, did not agree with this distinction. He stated that the employment discrimination statutes at issue were enacted under the fourteenth amendment *and* the commerce clause, both of which are enumerated congressional powers created by surrender of state sovereignty.<sup>68</sup>

#### 4. The Clear Statement Rule

Finally, since its 1985 decision in *Atascadero State Hospital v. Scanlon*,<sup>69</sup> the Court has further refined what has come to be known as the

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59. See *id.* at 677-78.

60. See *Ex parte Young*, 209 U.S. 123 (1908).

61. *Edelman*, 415 U.S. at 664.

62. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)).

63. "I remain of the opinion that 'because of its surrender [in art. I, § 8, cl. 1 ], no immunity exists that can be the subject of a congressional declaration or a voluntary waiver' . . ." *Id.* at 688 (Brennan, J., dissenting); see U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the . . . general Welfare of the United States . . .").

64. 427 U.S. 445 (1976).

65. Section five of the fourteenth amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

66. *Fitzpatrick*, 427 U.S. at 456.

67. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2302 (1989) (Scalia, J., concurring in part, dissenting in part) (arguing that only post-eleventh amendment provisions directed against the states' authority can be read to permit abrogation); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (including ability of Congress to abrogate under fourteenth amendment in category of "well-established exceptions to the reach of the Eleventh Amendment").

68. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457-58 (1976) (Brennan, J., concurring).

69. 473 U.S. 234 (1985).

"clear statement" rule of congressional abrogation.<sup>70</sup> In *Atascadero*, the Court held that congressional intent to abrogate the states' immunity must be "unmistakably clear" in the text of the statute.<sup>71</sup> And in *Dellmuth v. Muth*,<sup>72</sup> decided the same day as *Union Gas*, the Court made the test even tougher, holding that congressional intent must be "unequivocal."<sup>73</sup> The rule derives from basic federalism considerations of the "constitutional role of the States"<sup>74</sup> and a consequent desire to avoid overreaching by the federal judiciary.<sup>75</sup>

Recently, therefore, the Court has upheld the states' eleventh amendment immunity claims based on the lack of unequivocal evidence that Congress intended to abrogate in the statute at issue. It has not had to reach the question of whether Congress actually had power to abrogate in the first place.

In *Atascadero* and *Muth*, the statutes at issue were enacted under the fourteenth amendment.<sup>76</sup> Thus, *Fitzpatrick* affirmatively resolved the power question in those cases. The statutes at issue in other recent eleventh amendment cases, however, were enacted under the commerce clause and the bankruptcy clause.<sup>77</sup> The plurality in *Welch v. Texas Department of Highways and Public Transportation* tersely stated: "We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment."<sup>78</sup>

At the time of the *Union Gas* decision, *Atascadero*'s strong clear statement rule was in effect, and the issue of congressional power to abrogate under constitutional provisions other than the fourteenth amendment was open. In addition, whether *Hans* would propel itself out of article

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70. See, e.g., *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2822 (1989) (following *Atascadero*); *Dellmuth v. Muth*, 109 S. Ct. 2397, 2401 (1989) ("evidence of congressional intent must be both unequivocal and textual"); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 476-78 (1987) (overruling discussion of congressional intent in *Parden*).

71. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

72. 109 S. Ct. 2397 (1989).

73. See *id.* at 2401.

74. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 477 (1987).

75. See *Tribe, supra* note 3, at 696 n.73. "The point of [the clear statement rule] is to make sure that state concerns are given an adequate airing in congressional processes of decision." *Id.* The Court's lengthy discussion of protection of state sovereignty in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), calls this notion into question. See *id.* at 550-54. There the Court reasoned that the structure of the federal government was the most important insurer of state interests: "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

76. See *Dellmuth v. Muth*, 109 S. Ct. 2397, 2400 n.1 (1989); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985).

77. See *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2821 (1989); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 475 & n.5 (1987).

78. *Welch*, 483 U.S. at 475 (citation omitted).

III and become an even more formidable constitutional precedent remained to be seen.

## II. UNION GAS—AN OVERVIEW

The federal government and the state of Pennsylvania conducted successful clean-up activities at the first Superfund site, where Union Gas had operated a coal gasification facility. The United States then sued Union Gas<sup>79</sup> to recover for clean-up expenses under sections 104 and 107 of the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA").<sup>80</sup> Union Gas filed a third-party complaint against Pennsylvania alleging that the state, which had acquired easements over the site and thus become an owner-operator, had negligently caused deposits of coal tar to seep into a creek that the state was excavating.<sup>81</sup> Pennsylvania moved to dismiss the third-party complaint, arguing that the eleventh amendment precluded jurisdiction over a state in a suit by a private plaintiff.<sup>82</sup>

The district court dismissed the complaint against the state, finding that Congress' intent to abrogate states' immunity in CERCLA was not sufficiently clear.<sup>83</sup> The court rejected Union Gas' argument that the definition of a "person," who can be liable under the statute for clean-up costs, includes a state.<sup>84</sup>

After settling with the federal government, Union Gas proceeded to appeal the district court's dismissal of its action against Pennsylvania.<sup>85</sup> The Third Circuit noted that Union Gas' argument based on the definition of "person" was "not without force,"<sup>86</sup> but nevertheless affirmed the judgment of dismissal.<sup>87</sup>

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79. See *United States v. Union Gas Co.*, 575 F. Supp. 949 (E.D. Pa. 1983).

80. 42 U.S.C. §§ 9604, 9606 (1982). CERCLA provides that the owner or operator of a facility where a hazardous substance is disposed of is liable for cleanup costs. *Id.* § 9607(a)(1).

81. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2276-77 (1989); *United States v. Union Gas*, 575 F. Supp. at 950.

82. See *United States v. Union Gas Co.*, 575 F. Supp. at 950.

83. See *United States v. Union Gas Co.*, 575 F. Supp. 949, 952-53 (E.D. Pa. 1983).

84. See *id.* at 953; see also 42 U.S.C. § 9601(21) (1982) (definition of "person").

85. See *United States v. Union Gas Co.*, 792 F.2d 372, 375 (3d Cir. 1986).

86. *Id.* at 379.

87. See *id.* at 374. The Third Circuit relied primarily on *Employees* and *Atascadero*. The Supreme Court decided the latter case—in which it definitively set forth the clear statement rule—after the district court's decision, presumably making the task of the Court of Appeals even easier.

Judge Higginbotham dissented, reasoning that the definitional section was adequate evidence of intent to abrogate. He chided the majority for its strict statutory interpretation:

In the future, to comply with the rationale of the majority, in definitional sections of similar statutes where remedies are provided for damages citizens or corporations have suffered, Congress must use language similar to the following: "The term person includes a state, and we really mean the state, and furthermore the eleventh amendment's prohibition on suits against the states does not apply."

Union Gas filed a petition for writ of certiorari. In the interim, however, Congress passed the Superfund Amendments and Reauthorization Act of 1986 ("SARA").<sup>88</sup> The Supreme Court granted certiorari, vacated the judgment and remanded the case to the Third Circuit for reconsideration in light of SARA.<sup>89</sup>

On remand, the Third Circuit concluded that SARA succeeded in abrogating the states' immunity.<sup>90</sup> The court found congressional intent to abrogate in the parallel language of the SARA provision abrogating states' immunity and the CERCLA provision abrogating the federal government's immunity.<sup>91</sup>

Having found intent to abrogate, the court addressed Congress' power to abrogate under article I.<sup>92</sup> The court found that the states are presumptively immune from private suit by virtue of the eleventh amendment, but that the presumption can be overcome "where Congress has clearly articulated its desire to abrogate [the states' immunity]."<sup>93</sup> In addition, in order to abrogate, Congress must act under one of its plenary powers.<sup>94</sup>

The Supreme Court granted certiorari<sup>95</sup> on the issues of "whether [CERCLA] as amended by [SARA] permits a suit for monetary damages against a State in federal court and, if so, whether Congress has the authority to create such a cause of action when legislating pursuant to the Commerce Clause."<sup>96</sup>

Justices Brennan, Marshall, Stevens, Blackmun and Scalia found that "CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court."<sup>97</sup> Justice White, Chief Justice Rehnquist and Justices O'Connor and Kennedy found no unmistakable ex-

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*Id.* at 383 (Higginbotham, J., dissenting).

88. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

89. *Union Gas Co. v. Pennsylvania*, 479 U.S. 1025 (1987).

90. *United States v. Union Gas Co.*, 832 F.2d 1343, 1345 (3d Cir. 1987).

91. *See id.* at 1348. Compare 42 U.S.C. § 9607(g) (now codified at 42 U.S.C. § 9620(a)(1) (Supp. V 1987)) ("[The Federal Government] shall be subject to . . . this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . .") with 42 U.S.C. § 9601(20)(D) (Supp. V 1987) (definitional paragraph added by SARA) ("[A] State . . . shall be subject to the provisions of this Chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity . . .").

92. *See Union Gas Co.*, 832 F.2d at 1350; *see also supra* note 10.

93. *Union Gas*, 832 F.2d at 1354.

94. *See United States v. Union Gas Co.*, 832 F.2d 1343, 1354 (3d Cir. 1987). The court relied heavily on the reasoning of the Seventh Circuit in *In re McVey Trucking*, 812 F.2d 311 (7th Cir.), *cert. denied*, 484 U.S. 895 (1987) (eleventh amendment limits judicial, not congressional power; key issue is whether grant of congressional power is plenary, not whether power was granted before or after passage of the eleventh amendment). *But see supra* note 57.

95. *Pennsylvania v. Union Gas Co.*, 485 U.S. 958 (1988).

96. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2276 (1989).

97. *Id.* at 2280; *see id.* at 2277-80 (Brennan, J.); *infra* text accompanying note 106-111.

pression of congressional intent to abrogate in either statute.<sup>98</sup>

On the issue of power to abrogate under the commerce clause, Justices Brennan, Marshall, Stevens, Blackmun and White found that the commerce clause grants Congress the power to abrogate states' immunity.<sup>99</sup> Justice Scalia, Chief Justice Rehnquist and Justices O'Connor and Kennedy found that Congress lacked the power to abrogate under the commerce clause.<sup>100</sup> In addition to the opinions of Justices Brennan, White and Scalia, Justice Stevens filed a concurring opinion,<sup>101</sup> and Justice O'Connor filed a dissenting opinion.<sup>102</sup>

Thus, all possible combinations of votes on the two issues were represented: intent to abrogate and commerce clause power to abrogate (Justices Brennan, Marshall, Stevens and Blackmun), intent to abrogate but no commerce clause power to abrogate (Justice Scalia), no intent to abrogate and commerce clause power to abrogate (Justice White), and no intent to abrogate and no commerce clause power to abrogate (Chief Justice Rehnquist and Justices O'Connor and Kennedy). The theoretical bases for and anomalies presented by these views are discussed below.

### III. *UNION GAS*—A CLEAR HOLDING, A SHAKY PRECEDENT

The main opinions in *Union Gas* clearly delineate the two issues—congressional intent to abrogate and commerce clause authority to abrogate. The combination of results reached by the Justices is illustrative of the various theories on state sovereign immunity. Therefore, the focus of this discussion is on the theory that each opinion represents. Lurking in the background is the Court's struggle over whether *Hans v. Louisiana* should be overruled—or, more accurately, how to *avoid* overruling *Hans* and still fashion a reasonable eleventh amendment jurisprudence.

#### A. *Justice Brennan's Opinion*

In keeping with his view that the states have no immunity in areas in which they surrendered their power to Congress, Justice Brennan paid lip service to the clear statement rule<sup>103</sup> in finding that CERCLA and SARA, read together, give unmistakable evidence of congressional intent to abrogate.<sup>104</sup> His interpretation, however, while perfectly reasonable, is out of step with established precedent. In fact, the Court reiterated the clear statement rule of *Atascadero* in seemingly unavoidable terms on the

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98. See *Union Gas*, 109 S. Ct. at 2289-95 (White, J., concurring).

99. See *id.* at 2280-86 (Brennan, J.).

100. See *id.* at 2301-02 (Scalia, J., concurring in part, dissenting in part).

101. See *id.* at 2286-89 (Stevens, J., concurring); *infra* notes 185-194 and accompanying text.

102. See *id.* at 2303-04 (O'Connor, J., dissenting); *infra* text accompanying note 195-197.

103. See *The Supreme Court, 1988 Term—Leading Cases*, 103 Harv. L. Rev. 137, 215 & n.67 (1989).

104. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2276-80 (1989).

same day that it decided *Union Gas*.<sup>105</sup>

Justice Brennan's reasoning turned on the relation of the definitional provisions in both CERCLA and SARA. In the CERCLA liability provision,<sup>106</sup> a "person" can be liable for cleanup costs and other damages. In the CERCLA definitional section,<sup>107</sup> a "State" is included in the definition of "person." Given *Employees'* rejection of inferring abrogation from a definitional section,<sup>108</sup> Justice Brennan went on to show that a new definitional section,<sup>109</sup> added by SARA, did the trick.<sup>110</sup> The new section exempts from liability states and local governments that acquire facilities involuntarily, unless they are at least partly at fault for the release or threatened release of a hazardous substance from the facility.<sup>111</sup> It would be unnecessary to exempt the states from liability for involuntarily-acquired facilities, the argument goes, if the states were not already liable under CERCLA.<sup>112</sup>

Justice Brennan reinforced his argument by referring to two other sections of CERCLA. These sections essentially exempted states from liability which presumably would be unnecessary were the states not already potentially liable.<sup>113</sup> Finally, he pointed to the SARA language that "mirrors" the CERCLA waiver of federal government immunity as evidence of Congress' intention to override the states' immunity.<sup>114</sup>

Although relying exclusively on the language of CERCLA and SARA, Justice Brennan stretched the unmistakable language test of *Atascadero* and *Muth* into something more closely resembling an unmistakable intent test.<sup>115</sup> Footnote two of his opinion most clearly demonstrated Jus-

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105. See *Dellmuth v. Muth*, 109 S. Ct. 2397, 2401 (1989) (court may not look at legislative history for evidence of congressional intent to abrogate; such evidence "must be both unequivocal and textual").

106. 42 U.S.C. § 9607.

107. 42 U.S.C. § 9601(21).

108. See *supra* notes 50-51 and accompanying text.

109. 42 U.S.C. § 9601(20)(D).

110. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2277-78 (1989).

111. 42 U.S.C. § 9601(20)(D) (Supp. V 1987). This section is an amendment of the "owner-operator" liability provision in 42 U.S.C. § 9607(a)(1) (Supp. V 1987).

112. [SARA contains] an express acknowledgment of Congress' background understanding—evidenced first in its inclusion of States as 'persons'—that States would be liable in any circumstance described in [the CERCLA liability provision] from which they were not expressly excluded. The "exclusion" furnished to the States . . . would be unnecessary unless such a background understanding were at work.

*Union Gas*, 109 S. Ct. at 2278.

113. See *id.* at 2278-79; 42 U.S.C. §§ 9607(d)(2), 9659(a)(1) (Supp. V 1987).

114. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2279 (1989).

115. A footnote battle between Justices Brennan and White highlights this shift. Compare *id.* at 2278 n.2 (accusing Justice White of ignoring the majority's combined reading of CERCLA and SARA in finding abrogation); *id.* at 2280 n.3 (disputing Justice White's interpretation of SARA provision making state or local governments liable to the same extent "as any nongovernmental entity"); *id.* at 2280 n.4 (quibbling with Justice White over his disclaimed requirement of "magic words" in a statute which purports to abrogate) with *id.* at 2290 n.1 ("reject[ing] . . . outright" the majority's combined reading of CERCLA and SARA); *id.* at 2292 n.4 (attacking Justice Brennan's interpretation of 42



tice Brennan's loose application of the *Atascadero* standard: "[S]urely judges can disagree about the content and rigor of the standard of 'unmistakable clarity,' and if they do, they are likely to reach different results on States' amenability to suit for reasons having nothing to do with the statutory language itself."<sup>116</sup> If one faithfully followed the strictures of *Atascadero* and *Muth*, as Justice White does,<sup>117</sup> no such disagreement would be possible. Thus, Justice Brennan seemed to use only that part of the unmistakable language test that mandates looking exclusively at the text of a statute for evidence of congressional intent to abrogate. He then proceeded to turn the inquiry into one of unmistakable *intent*, thus making it permissible to engage in comparisons between different sections of a statute and to draw inferences from such comparisons.

In Part III of the opinion, Justice Brennan's surrender theory finally carried the day.<sup>118</sup> As background, he cited a "trail" of cases "unmistakably leading to the conclusion that Congress may permit suits against the States for money damages."<sup>119</sup> He deemed the reasoning of *Fitzpatrick v. Bitzer* equally applicable to authority under the commerce clause.<sup>120</sup> Specifically, Justice Brennan stated that the commerce clause, like the fourteenth amendment, is a plenary power which "both expands federal power and contracts state power."<sup>121</sup>

Pennsylvania had advanced, as did Justice Scalia, a chronological argument to distinguish fourteenth amendment abrogation authority from authority derived from the commerce clause. That is, the fourteenth amendment altered the principle represented by the eleventh amendment (that an unconsenting state cannot be sued by a private plaintiff in federal court), while the eleventh amendment altered Congress' authority under the commerce clause.<sup>122</sup> Justice Brennan refuted this argument by simply adding a new level—the pre-ratification existence of sovereign immu-

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U.S.C. § 9607(d)(2)); *id.* at 2293 n.5 (disputing Justice Brennan's interpretation of SARA); *id.* at 2294 n.6 (questioning Justice Brennan's interpretation of phrase "as any nongovernmental entity"); *id.* at 2294 n.7 (comparing amendments to Rehabilitation Act after *Atascadero*, which make specific reference to the eleventh amendment, with SARA, which does not).

116. *Id.* at 2278 n.2.

117. See *infra* notes 131-135 and accompanying text.

118. Or did it? See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2295 (1989) (White, J., concurring) ("I agree with the conclusion . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of [Justice Brennan's] reasoning.").

It is interesting to note that while Justice Brennan is specific in finding the commerce clause as a source of authority to abrogate, Justice White finds that the source of authority can be *any* clause of article I. See *The Supreme Court, 1988 Term—Leading Cases*, *supra* note 103, at 216 & n.75.

119. *Union Gas*, 109 S. Ct. at 2281 (discussing *Parden's* surrender theory, *Employees'* acceptance of it, and *Welch* and *Oneida Indian Nation's* assumption of commerce clause authority).

120. See *id.* at 2282.

121. *Id.*

122. See *id.* at 2282-83.

nity—to the chronology.<sup>123</sup> Thus, the commerce clause worked a change on the doctrine of sovereign immunity.<sup>124</sup>

Finally, Justice Brennan cited the need for private causes of action to effectuate Congress' goals in enacting commerce clause legislation,<sup>125</sup> an idea that bears some resemblance to classic abrogation theory.<sup>126</sup>

The internal inconsistency in Justice Brennan's opinion arises in its last paragraph, where he states, "Given our ruling in favor of *Union Gas*, we need not reach its argument that [*Hans*] should be overruled."<sup>127</sup> The trouble lies in the fact that the ruling upholding commerce clause power to abrogate can be seen as itself overruling *Hans*. That is, if *Hans* held that the eleventh amendment bars private federal question suits against unconsenting states, the Court has now opened up a very large area of potential federal question suits, those based on congressionally-created commerce clause causes of action. Thus, it seems somewhat disingenuous for the Court to deal with the implications of its decision for *Hans* by not dealing with *Hans* at all.<sup>128</sup>

A likely explanation for this inconsistency is the pragmatic one, namely that in order to ensure Justice White's fifth vote on the commerce clause issue,<sup>129</sup> Justice Brennan had to state specifically that he was leaving *Hans* alone. Since only four Justices favor overruling *Hans*,<sup>130</sup> Justice Brennan's explicit bow to *Hans* was superfluous.

### B. Justice White's Opinion

The main difference between Justice White's view on abrogation in *Union Gas* and Justice Brennan's view is that Justice White, strictly applying *Atascadero*, refused to look at CERCLA and SARA together.<sup>131</sup> He first rejected CERCLA as containing evidence of congressional intent

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123. See *id.* at 2283.

124. See *id.* ("[I]t is not the Commerce Clause that came first, but 'the principle embodied in the Eleventh Amendment' that did so.") But see C. Jacobs, *supra* note 3, at 5-9 (pre-ratification acceptance of complete sovereign immunity is questionable).

125. Justice Brennan explained:

If States, which comprise a significant class of owners and operators of hazardous-waste sites . . . need not pay for the costs of cleanup, the overall effect on voluntary cleanups will be substantial. This case thus shows why the space carved out for federal legislation under the commerce power must include the power to hold States financially accountable not only to the Federal Government, but to private citizens as well.

*Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2285 (1989); see *The Supreme Court, 1988 Term—Leading Cases*, *supra* note 103, at 215-16.

126. See *supra* note 19.

127. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2286 (1989).

128. See *supra* note 57.

129. See *Union Gas*, 109 S. Ct. at 2295 n.8 (Justice White's conclusion that *Hans* should not be overruled).

130. See *Dellmuth v. Muth*, 109 S. Ct. 2397, 2403 (1989) (Brennan, J., dissenting) (joined by Justices Marshall, Blackmun and Stevens, urging overruling *Hans*).

131. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2290 n.1 (1989) (White, J., concurring in judgment).

to abrogate, relying on *Employees'* holding that inclusion of states in a definitional section is not the kind of unmistakable evidence required.<sup>132</sup> Instead, Justice White concluded that such language means that the *federal government* may sue states for violations of the statute.<sup>133</sup>

In addition, Justice White relied on the separate waiver of federal government immunity, which he concluded would be redundant if Congress had waived that immunity by including the United States Government in the definition of "person."<sup>134</sup> Likewise, he viewed the SARA exemption from liability for state and local governments that involuntarily acquire facilities as just limiting the liability of the *federal government*.<sup>135</sup>

At the same time, Justice White cryptically found that Congress had authority to abrogate, not only under the commerce clause, but under all of article I.<sup>136</sup> Given that his view on the abrogation issue is dispositive, it is interesting that he chose to address the congressional authority issue at all.<sup>137</sup>

Unfortunately, he raised and dispensed with the issue in one uninformative paragraph in which he also reiterated his view that *Hans* should not be overruled.<sup>138</sup> He relied on "the reasons stated by the plurality in [*Welch*]."<sup>139</sup> The *Welch* plurality, however, relied primarily on the doctrine of stare decisis, bolstered by the ambiguity of the historical evidence concerning article III's effect on state sovereign immunity.<sup>140</sup> In the face of such ambiguous evidence, the *Welch* plurality chose to rely on the *Hans* Court's view—based largely on the statements by Madison, Mar-

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132. See *id.* at 2291.

133. See *id.*

134. See *id.* at 2290.

135. See 42 U.S.C. § 9601(20)(D) (Supp. V 1987).

The term "owner or operator" does not include a unit of State or local government which acquired ownership . . . involuntarily . . . [This] exclusion . . . shall not apply to any State . . . which has caused . . . the release . . . of a hazardous substance . . . and such a State . . . shall be subject to . . . [this Act] . . . to the same extent . . . as any nongovernmental entity . . .

*Id.* Dissecting this section, Justice White found that the liability-creating section expressly applies only to those exempted owners and operators who subsequently cause a discharge of a hazardous substance. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2293 (1989). He also asserted that the words "as any nongovernmental entity," which describe the extent of liability, "[have] meaning as something less than an abrogation provision because . . . [they exist] to make the States liable to the Federal Government." *Id.*

136. See *id.* at 2295. Herein lies the difference between Justice White's finessing of *Hans* and Justice Brennan's. Justice White apparently believes that *Hans* only affects Congress' ability to abrogate under Article III. Justice Brennan's surrender theory asserts that *Hans* only affects Congress' ability to abrogate under self-imposed constitutional prohibitions like the contract clause.

137. See *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2824 (1989) (disposing of case for lack of clear statement of abrogation).

138. *Union Gas*, 109 S. Ct. at 2295 n.8.

139. *Id.*

140. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 479-88 (1987).

shall and Hamilton<sup>141</sup>—that article III cannot be interpreted to allow an unconsenting state to be sued in federal court.

It would seem that the principle of state sovereign immunity to which Justice White subscribes cannot be constitutional.<sup>142</sup> If it were, it could not be subject to congressional abrogation.<sup>143</sup> Furthermore, under its broad article I legislative powers, Congress can now presumably abrogate the states' immunity in virtually any area. This would, in turn, substantially eviscerate the supposedly broad effect of *Hans* in ensuring that private plaintiffs would not be able to call unconsenting states into federal courts.

Justice White, however, carefully avoided overruling *Hans*. In *Hans*, the statute that purported to abrogate state sovereign immunity, the Judiciary Act of 1875 (which conferred general federal question jurisdiction), was enacted under article III, which according to *Hans* and subsequent cases, cannot be interpreted to abrogate.<sup>144</sup> In *Union Gas*, however, the statutes that purport to abrogate were enacted under article I, which neither the historical evidence nor *Hans* addresses.<sup>145</sup>

The fact that *all* statutes that abrogate are subjected to the clear statement test bolsters the conclusion that eleventh amendment immunity is actually immunity from intrusions based solely on article III. Presumably, if a distinction between pre- and post-eleventh amendment provisions was at work, those statutes enacted under the latter would require less of a clear statement.<sup>146</sup>

Justice White is able to exert control over potential wholesale abrogation under article I, or any other power, by extremely strict adherence to

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141. See *supra* note 17.

142. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2286 (1989) (Stevens, J., concurring) (distinguishing between the "legitimate scope of the Eleventh Amendment limitation on federal judicial power" and the "judicially created doctrine of state immunity even from suits alleging violation of federally protected rights").

143. See *Jackson*, *supra* note 3, at 125.

144. See *supra* note 17.

145. See *The Supreme Court, 1988 Term—Leading Cases*, *supra* note 103, at 215. As a way of skirting *Hans*, Justice White's distinction between article I and article III is perhaps neater than Justice Brennan's distinction between enumerated powers and self-imposed prohibitions. See *supra* note 57. Article III is not self-executing; Congress must act for its provisions to have effect. *Hans* held that it may not infringe on state sovereignty in doing so. The Court has never limited Congress in this way with respect to its other powers. But see *Union Gas*, 109 S. Ct. at 2301 (Scalia, J., concurring in part, dissenting in part) (noting that permitting suits against states under article I "contradicts our unvarying approach to Article III as setting forth the exclusive catalog of permissible federal-court jurisdiction") (emphasis in original).

146. See *Jackson*, *supra* note 3, at 112 (arguing that clear evidence is an inappropriate interpretative tool for statutes enacted under section five of the fourteenth amendment; for other types of legislation, which purport to overcome the federal common-law presumption of state immunity, a "more complex inquiry based on a range of indicia of Congress' intent and statutory purpose must be invoked"); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1975) (stressing fourteenth amendment's direct effect on state authority).

*Atascadero's* clear statement rule.<sup>147</sup> The result reached by Justice White is facially similar to classic abrogation theory.<sup>148</sup> This theory argues that the eleventh amendment corrected the *Chisholm* Court's interpretation of article III as abrogating state sovereign immunity of its own force and that Congress can subject states to federal court suit when it legislates under its other plenary powers, such as article I.<sup>149</sup> Abrogation theory asserts that article III and the eleventh amendment give states rights against the federal judiciary but do not affect congressional power.<sup>150</sup>

The subtle difference between abrogation theory and Justice White's view is that for the former, a clear statement requirement serves the purpose of "ensur[ing] that attempts to limit state power [are] unmistakable, thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests."<sup>151</sup> By contrast, Justice White, while serving as self-appointed guardian of congressional intent, always on the lookout for judicial overreaching, more likely serves to defeat congressional intent by forcing courts to look myopically at federal statutes in search of precise words.<sup>152</sup> Although he claims that no specific words, such as reference to the eleventh amendment, are necessary,<sup>153</sup> it would seem that a finding of anything less could preclude a finding of congressional intent to abrogate.<sup>154</sup>

### C. Justice Scalia's Opinion

Justice Scalia's opinion<sup>155</sup> is, at first glance, internally inconsistent. He began by providing the swing vote on the congressional intent issue.<sup>156</sup> He quickly dismissed Justice White's argument by stating that it is not correct to interpret CERCLA and SARA separately: "Whether it was the CERCLA Congress that envisioned [abrogation], or the SARA Congress, is to me irrelevant. The law does."<sup>157</sup> Justice Scalia concluded by finding that Congress had no authority under the commerce clause to subject states to liability in federal court for money damages.<sup>158</sup> In effect, he was saying that Congress passed an amendment in technically suffi-

147. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2289-94 (1989); *supra* notes 131-135 and accompanying text.

148. See *supra* note 19.

149. But see *Union Gas*, 109 S. Ct. at 2299-300 (Scalia, J., concurring in part, dissenting in part). Justice Scalia contended that article III was never intended as a source of abrogation authority, as the Court made clear in *Hans*.

150. See *Tribe*, *supra* note 3, at 693.

151. *Id.* at 695.

152. See *Dellmuth v. Muth*, 109 S. Ct. 2397, 2405-06 (1989) (Brennan, J., dissenting).

153. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2294 n.7 (1989).

154. But see *Muth*, 109 S. Ct. at 2403 (Scalia, J., concurring).

155. See *Union Gas*, 109 S. Ct. at 2295-2303 (Scalia, J., concurring in part, dissenting in part).

156. See *Union Gas*, 109 S. Ct. at 2295.

157. *Id.* at 2296; cf. *Dellmuth v. Muth*, 109 S. Ct. 2397, 2403 (1989) (Scalia, J., concurring) (finding "explicit reference to state sovereign immunity or the Eleventh Amendment" not necessary for effective abrogation).

158. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2299-302 (1989).

cient language, although a proper interpretation would reveal Congress had no authority to do so.

Justice Scalia's concurring opinion in *Hoffman v. Connecticut Department of Income Maintenance*<sup>159</sup> compounds the mystery of why he felt compelled to address the congressional intent issue when the commerce clause issue was dispositive. In *Hoffman*, he found that Congress had no authority to abrogate under the bankruptcy clause, and that this fact precluded "the necessity of considering whether Congress intended to exercise a power it did not possess."<sup>160</sup>

In the middle of his *Union Gas* opinion, Justice Scalia discussed the overruling of *Hans v. Louisiana*, an issue he had declined to address in *Welch*.<sup>161</sup> He apparently believes that *Hans* is the key to the issue of congressional authority to abrogate under constitutional provisions that predate the eleventh amendment.<sup>162</sup>

Not surprisingly, he found that *Hans* should not be overruled.<sup>163</sup> Mirroring sovereign immunity theory, this section of his opinion focused predominantly on the effect of article III on the pre-ratification doctrine of sovereign immunity.<sup>164</sup> Article III, he suggested, did not by itself abrogate state sovereign immunity.<sup>165</sup> The *Chisholm* Court interpreted article III in this way with a literal interpretation of the state-citizen diversity clause, however, and was almost immediately overruled by Congress when it passed the eleventh amendment. This indicates that the eleventh amendment restored state sovereign immunity to its pre-*Chisholm* status.<sup>166</sup> Thus, Justice Scalia can conclude that an interpretation of *Hans* as embodying a constitutional principle of state sovereign immunity is entirely reasonable.<sup>167</sup>

Justice Scalia also dealt with policy considerations by discounting the need for a federal forum to hear suits by private plaintiffs against states.<sup>168</sup> Finally, acknowledging the weakness of the historical evidence

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159. 109 S. Ct. 2818, 2824 (1989) (Scalia, J., concurring in judgment).

160. *Id.*

161. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 495-96 (1987) (Scalia, J., concurring in part and concurring in judgment).

162. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2296 (1989) (Scalia, J., concurring in part and dissenting in part) ("Finding that the statute renders the States liable in private suits for money damages, I must consider the continuing validity of *Hans v. Louisiana* . . .").

163. *Id.* at 2299.

164. See *id.* at 2296-97.

165. See *id.* at 2297.

166. Unfortunately, Justice Scalia has almost none of the eleventh amendment scholarship on his side. See *supra* notes 18-22 and accompanying text; sources cited *supra* note 3.

167. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2297-99 (1989). In addition, this interpretation allows for recognizing such a principle in many other areas. See, e.g., *Ex parte New York*, No. 1, 256 U.S. 490, 503 (1921) (eleventh amendment applicable to admiralty suits); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (eleventh amendment applicable to suits by foreign state against state).

168. See *Union Gas*, 109 S. Ct. at 2298. "The inherent necessity of a tribunal for

for sovereign immunity theory, he relied on *stare decisis*, or, in his words, the "mere venerability of an answer consistently adhered to for almost a century."<sup>169</sup> He stopped just short of saying that *stare decisis* was the sole reason for not overruling *Hans*.

Justice Scalia summarily rejected Justice Brennan's surrender theory.<sup>170</sup> He characterized both Justice Brennan's and Justice White's attempts to distinguish *Hans* as "gossamer" and stated in essence that the Court should either make peace with the sovereign immunity theory of *Hans* or reject it outright.<sup>171</sup>

In Part III of his opinion, Justice Scalia set forth his view that the Court, when faced with a statute enacted under a pre-eleventh amendment constitutional provision, should look for congressional authority to abrogate sovereign immunity only in article III.<sup>172</sup> He referred to sovereign immunity as "a fundamental principle of federalism" and a "structural component of federalism, and not merely a default disposition that can be altered by action of Congress pursuant to its Article I powers."<sup>173</sup> Thus, allowance of abrogation under any power other than article III would be contrary to considerations of federalism.<sup>174</sup>

Justice Scalia distinguished *Fitzpatrick v. Bitzer* on the basis that the fourteenth amendment is expressly directed at the states' authority, and thus, abrogation under section five of that amendment is reasonable.<sup>175</sup> He set the stage, however, for a limited interpretation of this principle when he stated that the fourteenth amendment "permits abrogation of . . . sovereign immunity only for a limited purpose."<sup>176</sup>

In Part IV, he advocated overruling the first half of *Parden v. Terminal Railway*, in which the Court held that Congress, legislating under the commerce clause, could condition state participation in interstate com-

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peaceful resolution of disputes between the Union and the individual States, and between the individual States themselves, is incomparably greater, in my view, than the need for a tribunal to resolve disputes on federal questions between individuals and the States." *Id.* He offered little support for this statement other than a vague assertion that it follows from the "scheme of the Constitution." *Id.*

169. *Union Gas*, 109 S. Ct. at 2298.

170. *See id.* at 2301. *But see* Jackson, *supra* note 3, at 119-26 (arguing that overruling *Hans* would clarify the federal common law basis of its progeny).

171. *See* *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2299 (1989).

172. "We have never gone thumbing through the Constitution, to see what other original grants of authority—as opposed to Amendments adopted after the Eleventh Amendment—might justify elimination of state sovereign immunity." *Id.* at 2301.

173. *Id.* at 2299, 2300.

174. Justice Scalia added this dire prediction:

If private suits against States, though not permitted under Article III (by virtue of the understanding represented by the Eleventh Amendment), are nonetheless permitted under the Commerce Clause, or under some other Article I grant of federal power, then there is no reason why the other limitations of Article III cannot be similarly exceeded.

*Id.* at 2301.

175. *See* *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2302 (1989).

176. *Id.* (emphasis added).

merce on a waiver of immunity from suit in federal court.<sup>177</sup> Justice Brennan noted that the waiver issue had not been addressed by Union Gas and, consequently, was not addressed in his opinion.<sup>178</sup> In choosing to expound on this issue, Justice Scalia rounded out his view of sovereign immunity. He reasoned that conditional waiver and abrogation under pre-eleventh amendment provisions make an "end-run" around article III, and thus are both constitutionally impermissible.<sup>179</sup>

The first possible explanation of the inconsistency in Justice Scalia's opinion is that he wished to stake out a wide area of judicial review of statutes that purport to abrogate state sovereign immunity. By finding that Congress abrogated state sovereign immunity when it enacted CERCLA and SARA and then proceeding to find that Congress had no authority to do so, he presented the legal world with a *reductio ad absurdum* of the Court's view.

The second possible explanation is that Justice Scalia cast the fifth vote on congressional intent in order to express his approval, ironically, for the use of his favored method of statutory interpretation in a "liberal bloc" opinion. Justice Scalia advocates a plain meaning approach to statutory interpretation.<sup>180</sup> He believes that legislation is a product of compromises among different groups, and that trying to divine an intent from a statute may result in favoring one group.<sup>181</sup> He rejects the traditional assumption that legislators reasonably pursue reasonable goals and thus disapproves of using legislative history when interpreting a statute.<sup>182</sup> When statutory language is unclear, he will look to other portions of the statute or other statutes for similar language as an aid in interpretation.<sup>183</sup> This, of course, is precisely what Justice Brennan did in construing CERCLA and SARA, albeit for different reasons.<sup>184</sup>

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177. See *id.* at 2302-03.

178. *Id.* at 2286 n.5.

179. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2303 (1989).

180. See Aleinikoff, *Updating Statutory Interpretation*, 87 Mich. L. Rev. 20, 30 (1988).

181. See Note, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. Chi. L. Rev. 705, 723-24 (1987).

182. See Aleinikoff, *supra* note 180, at 30-31; Note, *supra* note 181, at 723-24. In a particularly telling passage in *Union Gas*, he wrote:

It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.

*Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2296 (1989) (Scalia, J., concurring in part, dissenting in part).

183. See Aleinikoff, *supra* note 180, at 30.

184. Justice Brennan clearly approves of looking at legislative history and trying to fathom the intent of the legislators in eleventh amendment cases. See *Dellmuth v. Muth*, 109 S. Ct. 2397, 2403-05 (1989) (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 248-52 (1985) (Brennan, J., dissenting). Coincidentally, constrained by the *Atascadero* standard, he "gets it right" in Justice Scalia's view.



#### D. Justice Stevens' Opinion

Justice Stevens concurred in a brief opinion<sup>185</sup> that has a decidedly different focus from the others. He first distinguished between what he considered the correct interpretation of the eleventh amendment, which has been explained by the diversity theorists,<sup>186</sup> and a "common law" defense of sovereign immunity that the Court created in *Hans* and subsequent cases.<sup>187</sup>

The defense of sovereign immunity, Justice Stevens argued, is based on a balancing of state and federal interests and not on the eleventh amendment.<sup>188</sup> He cited the conflict between a state's ability to waive its immunity to suit in federal court and the principle that a party may not confer subject matter jurisdiction on a federal court as proof that the amendment's express limit on judicial power is not at work.<sup>189</sup> He also explained that the *Edelman* distinction between permissible prospective relief and impermissible retrospective relief rested on balancing the vindication of federal rights and the states' immunity.<sup>190</sup>

Justice Stevens stated that congressional "abrogation" is really Congress' prudential alteration of the federal-state balance.<sup>191</sup> On the facts of *Union Gas*, he concluded that the federal interest of protecting the environment overcame any countervailing state interest.<sup>192</sup> Furthermore, Justice Stevens asserted that the Court should not, in any event, set aside Congress' decision on the appropriate federal-state balance.<sup>193</sup> Justice Stevens thus picks up where the diversity theorists leave off, providing a plausible reading of *Hans* and its progeny.<sup>194</sup>

#### E. Justice O'Connor's Opinion

Perhaps voicing the most conservative eleventh amendment interpretation, Justice O'Connor dissented.<sup>195</sup> She found that Congress had no power to abrogate the states' sovereign immunity under the commerce clause and joined Justice White's conclusion that there was no unmistak-

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185. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2286-89 (1989) (Stevens, J., concurring).

186. See *supra* notes 18-22 and accompanying text.

187. See *Union Gas*, 109 S. Ct. at 2286; *Dellmuth v. Muth*, 109 S. Ct. 2397, 2408 (1989) (Stevens, J., dissenting).

188. See *Union Gas*, 109 S. Ct. at 2287.

189. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2287 (1989).

190. See *id.* at 2287-88. Justice Stevens asserted that "comity and federalism concerns" also explain the anomaly of the Supreme Court's article III appellate review of state court judgments in actions that would have been barred in federal court by the eleventh amendment; that is, "a state-court decision defining federal law tips the balance in favor of federal review." *Id.* at 2288 & n.3.

191. *Id.* at 2288-89.

192. See *id.* at 2289.

193. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2289 (1989).

194. See *The Supreme Court, 1988 Term—Leading Cases*, *supra* note 103, at 216.

195. See *Union Gas*, 109 S. Ct. at 2303-04 (O'Connor, J., dissenting).

able evidence of congressional intent to abrogate.<sup>196</sup>

Her view of state sovereign immunity and congressional abrogation can be characterized as an attempt to "cover all the bases." She concurred with Justice Scalia that Congress has no authority to abrogate under pre-eleventh amendment provisions.<sup>197</sup> As long as a majority of the Court is using an abrogation analysis (and is unwilling to dispose of eleventh amendment cases on the power issue alone), however, it is likely that she will choose to contain the potential damage to state sovereign immunity by siding with the strictest view on abrogation.

### CONCLUSION

The holdings in *Union Gas* are clear: Congress abrogated state sovereign immunity when it enacted CERCLA and SARA, and Congress has authority to abrogate when legislating under the commerce clause. The divergent views put forth by the Justices, however, undermine the precedential value of the decision. On the issue of congressional intent to abrogate, Justice Brennan's loose application of the *Atascadero* standard probably does not signal a new approach. Justice Scalia likely provided the swing vote on this issue for a reason other than complete agreement, namely an opportunity to advance his own theory of statutory interpretation. Moreover, the decision in *Muth*, handed down the same day, made the *Atascadero* standard even stricter. The holding of congressional authority to abrogate under the commerce clause may be both problematic and ineffectual: problematic, because Justice White, the fifth vote, still subscribes to *Hans*, and ineffectual, because he advocates strict adherence to *Atascadero*.

*Union Gas* has the potential for contributing to eleventh amendment decisions that adhere more to the politics of a given lower court than to any coherent rule of law. With reference to the clear statement rule, so-called liberal courts can use *Union Gas* as authority for cutting back on the requirement of clear statement, thereby making it easier to find abrogation and proceed to the merits of the case. More conservative courts will be able safely to ignore this aspect of *Union Gas* on the strength of *Hoffman* and *Muth* and dispose of suits on the ground of lack of clear statement. Finally, lower courts will be able either to follow *Union Gas*' decision on congressional power to abrogate under the commerce clause or to cut back on it, at least until Justice White states the reasoning behind his cryptic concurrence.

Letitia A. Sears

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196. See *Hoffman v. Connecticut Dep't of Income Maintenance*, 109 S. Ct. 2818, 2824 (1989) (O'Connor, J., concurring).

197. See *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273, 2303-04 (1989) (O'Connor, J., dissenting).

